

FAR part 12 procedures for the acquisition of commercial items, unless an exception at 215.371-4(a) applies.

(ii) In solicitations that include 252.215-7008, Only One Offer, also include the provision at FAR 52.215-20, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, with any appropriate alternate as prescribed at FAR 15.408-1, if the contracting officer is requesting submission of data other than certified cost or pricing data with the offer.

(5) When the solicitation requires the submission of certified cost or pricing data, the contracting officer should include 252.215-7009, Proposal Adequacy Checklist, in the solicitation to facilitate submission of a thorough, accurate, and complete proposal.

[63 FR 55040, Oct. 14, 1998, as amended at 72 FR 20760, Apr. 26, 2007; 73 FR 27472, May 13, 2008; 75 FR 48279, Aug. 10, 2010; 77 FR 39139, June 29, 2012; 77 FR 43472, July 24, 2012; 77 FR 76940, Dec. 31, 2012; 78 FR 13543, Feb. 28, 2013; 78 FR 18872, Mar. 28, 2013; 78 FR 37986, June 25, 2013; 78 FR 65216, Oct. 31, 2013]

#### **215.470 Estimated data prices.**

(a) DoD requires estimates of the prices of data in order to evaluate the cost to the Government of data items in terms of their management, product, or engineering value.

(b) When data are required to be delivered under a contract, include DD Form 1423, Contract Data Requirements List, in the solicitation. See PGI 215.470(b) for guidance on the use of DD Form 1423.

(c) The contracting officer shall ensure that the contract does not include a requirement for data that the contractor has delivered or is obligated to deliver to the government under another contract or subcontract, and that the successful offeror identifies any such data required by the solicitation. However, where duplicate data are desired, the contract price shall include the costs of duplication, but not of preparation, of such data.

[63 FR 55040, Oct. 14, 1998, as amended at 71 FR 69495, Dec. 1, 2006]

### **Subpart 215.5—Preaward, Award, and Postaward Notifications, Protests, and Mistakes**

SOURCE: 78 FR 69270, Nov. 18, 2013, unless otherwise noted.

#### **215.503 Notifications to unsuccessful offerors.**

If the Government exercises the authority provided in 239.7305(d), the notifications to unsuccessful offerors, either preaward or postaward, shall not reveal any information that is determined to be withheld from disclosure in accordance with section 806 of the National Defense Authorization Act for Fiscal Year 2011, as amended by section 806 of the National Defense Authorization Act for Fiscal Year 2013 (see subpart 239.73).

#### **215.506 Postaward debriefing of offerors.**

(e) If the Government exercises the authority provided in 239.7305(d), the debriefing shall not reveal any information that is determined to be withheld from disclosure in accordance with section 806 of the National Defense Authorization Act for Fiscal Year 2011, as amended by section 806 of the National Defense Authorization Act for Fiscal Year 2013 (see subpart 239.73).

## **PART 216—TYPES OF CONTRACTS**

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- 216.405-2 Cost-plus-award-fee contracts.
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### **Subpart 216.6—Time-and-Materials, Labor-Hour, and Letter Contracts**

- 216.601 Time-and-materials contracts.
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- 216.603-3 Limitations.
- 216.603-4 Contract clauses.

### **Subpart 216.7—Agreements**

- 216.703 Basic ordering agreements.

AUTHORITY: 41 U.S.C. 1303 and 48 CFR chapter 1.

SOURCE: 56 FR 36340, July 31, 1991, unless otherwise noted.

## **Subpart 216.1—Selecting Contract Types**

### **216.102 Policies.**

In accordance with section 811 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239), use of any cost-reimbursement line item for the acquisition of production of major defense acquisition programs is prohibited unless the exception at 234.004(2)(ii) applies.

[79 FR 4632, Jan. 29, 2014]

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### **216.104-70 Research and development.**

Follow the procedures at PGI 216.104-70 for selecting the appropriate research and development contract type.

[71 FR 39007, July 11, 2006]

### **Subpart 216.2—Fixed-Price Contracts**

#### **216.203 Fixed-price contracts with economic price adjustment.**

##### **216.203-4 Contract clauses.**

(1) Generally, use the clauses at FAR 52.216-2, Economic Price Adjustment—Standard Supplies, FAR 52.216-3, Economic Price Adjustment—Semistandard Supplies, and FAR 52.216-4, Economic Price Adjustment—Labor and Material, only when—

(i) The total contract price exceeds the simplified acquisition threshold; and

(ii) Delivery or performance will not be completed within 6 months after contract award.

(2) Follow the procedures at PGI 216.203-4 when using an economic price adjustment clause based on cost indexes of labor or material.

[71 FR 39007, July 11, 2006]

#### **216.203-4-70 Additional provisions and clauses.**

(a) *Price adjustment for basic steel, aluminum, brass, bronze, or copper mill products.* (1)(i) The price adjustment clause at 252.216-7000, Economic Price Adjustment—Basic Steel, Aluminum, Brass, Bronze, or Copper Mill Products, may be used in fixed-price supply solicitations and contracts for basic steel, aluminum, brass, bronze, or copper mill products, such as sheets, plates, and bars, when an established catalog or market price exists for the particular product being acquired.

(ii) The 10 percent figure in paragraph (d)(1) of the clause shall not be exceeded unless approval is obtained at a level above the contracting officer.

(2) Use the price adjustment provision at 252.216-7007, Economic Price Adjustment—Basic Steel, Aluminum, Brass, Bronze, or Copper Mill Products—Representation, in solicitations that include the clause at 252.216-7000, Economic Price Adjustment—Basic

Steel, Aluminum, Brass, Bronze, or Copper Mill Products.

(b) *Price adjustment for nonstandard steel items.* (1) The price adjustment clause at 252.216-7001, Economic Price Adjustment—Nonstandard Steel Items, may be used in fixed-price supply contracts when—

(i) The contractor is a steel producer and actually manufacture the standard steel mill item referred to in the “base steel index” definition of the clause; and

(ii) The items being acquired are non-standard steel items made wholly or in part of standard steel mill items.

(2) When this clause is included in invitations for bids, omit Note 6 of the clause and all references to Note 6.

(3) Solicitations shall instruct offerors to complete all blanks in accordance with the applicable notes.

(4) When the clause is to provide for adjustment on a basis other than “established price” (see Note 6 of the clause), that price must be verified.

(5) The ten percent figure in paragraph (e)(4) of the clause shall not be exceeded unless approval is obtained at a level above the contracting officer.

(c) *Price adjustment for wage rates or material prices controlled by a foreign government.* (1)(i) The price adjustment clause at 252.216-7003, Economic Price Adjustment—Wage Rates or Material Prices Controlled by a Foreign Government, may be used in fixed-price supply and service solicitations and contracts when—

(A) The contract is to be performed wholly or in part in a foreign country; and

(B) A foreign government controls wage rates or material prices and may, during contract performance, impose a mandatory change in wages or prices of material.

(ii) Verify the base wage rates and material prices prior to contract award and prior to making any adjustment in the contract price.

(2) Use the provision at 252.216-7008, Economic Price Adjustment—Wage Rates or Material Prices Controlled by a Foreign Government—Representation, in solicitations that include the clause at 252.216-7003, Economic Price Adjustment—Wage Rates or Material Prices Controlled by a Foreign Govern-

ment. If the solicitation includes the provision at FAR 52.204-7, do not separately list the provision 252.216-7008 in the solicitation.

[56 FR 36340, July 31, 1991, as amended at 62 FR 34122, June 24, 1997; 62 FR 40472, July 29, 1997; 77 FR 19129, Mar. 30, 2012; 78 FR 37986, June 25, 2013, 78 FR 40043, July 3, 2013]

### Subpart 216.3—Cost-Reimbursement Contracts

#### 216.306 Cost-plus-fixed-fee contracts.

(c) *Limitations.* (i) Except as provided in paragraph (c)(ii) of this section, annual military construction appropriations acts prohibit the use of cost-plus-fixed-fee contracts that—

(A) Are funded by a military construction appropriations act;

(B) Are estimated to exceed \$25,000; and

(C) Will be performed within the United States, except Alaska.

(ii) The prohibition in paragraph (c)(i) of this section does not apply to contracts specifically approved in writing, setting forth the reasons therefor, in accordance with the following:

(A) The Secretaries of the military departments are authorized to approve such contracts that are for environmental work only, provided the environmental work is not classified as construction, as defined by 10 U.S.C. 2801.

(B) The Secretary of Defense or designee must approve such contracts that are not for environmental work only or are for environmental work classified as construction.

[62 FR 1058, Jan. 8, 1997; 62 FR 1817, Jan. 13, 1997; 62 FR 49305, Sept. 19, 1997; 71 FR 39007, July 11, 2006]

#### 216.307 Contract clauses.

(a) As required by section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239), use the clause at 252.216-7009, Allowability of Costs Incurred in Connection With a Whistleblower Proceeding—

(1) In task orders entered pursuant to contracts awarded before September 30, 2013, that include the clause at FAR 52.216-7, Allowable Cost and Payment; and

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(2) In contracts awarded before September 30, 2013, that—

(i) Include the clause at FAR 52.216-7, Allowable Cost and Payment; and

(ii) Are modified to include the clause at DFARS 252.203-7002, Requirement to Inform Employees of Whistle-blower Rights, dated September 2013 or later.

[78 FR 59861, Sept. 30, 2013]

### **Subpart 216.4—Incentive Contracts**

#### **216.401 General.**

(c) See PGI 216.401(c) for information on the Defense Acquisition University Award and Incentive Fees Community of Practice.

(e) Award-fee plans required in FAR 16.401(e) shall be incorporated into all award-fee type contracts. Follow the procedures at PGI 216.401(e) when planning to award an award-fee contract.

[75 FR 78619, Dec. 16, 2010, as amended at 76 FR 8305, Feb. 14, 2011]

#### **216.401-70 Data collection.**

Section 814 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364) requires DoD to collect relevant data on award and incentive fees paid to contractors and have mechanisms in place to evaluate such data on a regular basis. In order to comply with this statutory requirement, follow the procedures at PGI 216.401-70.

[75 FR 78619, Dec. 16, 2010]

#### **216.401-71 Objective criteria.**

(1) Contracting officers shall use objective criteria to the maximum extent possible to measure contract performance. Objective criteria are associated with cost-plus-incentive-fee and fixed-price-incentive contracts.

(2) When objective criteria exist but the contracting officer determines that it is in the best interest of the Government also to incentivize subjective elements of performance, the most appropriate contract type is a multiple-incentive contract containing both objective incentives and subjective award-fee criteria (i.e., cost-plus-incentive-

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fee/award-fee or fixed-price-incentive/award-fee).

(3) See PGI 216.401(e) for guidance on the use of award-fee contracts.

[76 FR 8305, Feb. 14, 2011]

#### **216.402 Application of predetermined, formula-type incentives.**

##### **216.402-2 Technical performance incentives.**

See PGI 216.402-2 for guidance on establishing performance incentives.

[71 FR 39007, July 11, 2006]

##### **216.403 Fixed-price incentive contracts.**

###### **216.403-1 Fixed-price incentive (firm target) contracts.**

(b) *Application.*

(1) The contracting officer shall give particular consideration to the use of fixed-price incentive (firm target) contracts, especially for acquisitions moving from development to production.

(2) The contracting officer shall pay particular attention to share lines and ceiling prices for fixed-price incentive (firm target) contracts, with a 120 percent ceiling and a 50/50 share ratio as the point of departure for establishing the incentive arrangement.

(3) See PGI 216.403-1 for guidance on the use of fixed-price incentive (firm target) contracts.

[76 FR 57679, Sept. 16, 2011]

###### **216.403-2 Fixed-price incentive (successive targets) contracts.**

See PGI 216.403-2 for guidance on the use of fixed-price incentive (successive targets) contracts.

[71 FR 39007, July 11, 2006]

##### **216.405 Cost-reimbursement incentive contracts.**

###### **216.405-1 Cost-plus-incentive-fee contracts.**

See PGI 216.405-1 for guidance on the use of cost-plus-incentive-fee contracts.

[71 FR 39007, July 11, 2006]

**216.405-2 Cost-plus-award-fee contracts.**

(1) *Award-fee pool.* The award-fee pool is the total available award fee for each evaluation period for the life of the contract. The contracting officer shall perform an analysis of appropriate fee distribution to ensure at least 40 percent of the award fee is available for the final evaluation so that the award fee is appropriately distributed over all evaluation periods to incentivize the contractor throughout performance of the contract. The percentage of award fee available for the final evaluation may be set below 40 percent if the contracting officer determines that a lower percentage is appropriate, and this determination is approved by the head of the contracting activity (HCA). The HCA may not delegate this approval authority.

(2) *Award-fee evaluation and payments.* Award-fee payments other than payments resulting from the evaluation at the end of an award-fee period are prohibited. (This prohibition does not apply to base-fee payments.) The fee-determining official's rating for award-fee evaluations will be provided to the contractor within 45 calendar days of the end of the period being evaluated. The final award-fee payment will be consistent with the fee-determining official's final evaluation of the contractor's overall performance against the cost, schedule, and performance outcomes specified in the award-fee plan.

(3) *Limitations.*

(i) The cost-plus-award-fee contract shall not be used—

(A) To avoid—

(1) Establishing cost-plus-fixed-fee contracts when the criteria for cost-plus-fixed-fee contracts apply; or

(2) Developing objective targets so a cost-plus-incentive-fee contract can be used; or

(B) For either engineering development or operational system development acquisitions that have specifications suitable for simultaneous research and development and production, except a cost-plus-award-fee contract may be used for individual engineering development or operational system development acquisitions ancillary to the development of a major weapon system or equipment, where—

(1) It is more advantageous; and

(2) The purpose of the acquisition is clearly to determine or solve specific problems associated with the major weapon system or equipment.

(ii) Do not apply the weighted guidelines method to cost-plus-award-fee contracts for either the base (fixed) fee or the award fee.

(iii) The base fee shall not exceed three percent of the estimated cost of the contract exclusive of the fee.

(4) See PGI 216.405-2 for guidance on the use of cost-plus-award-fee contracts.

[76 FR 8305, Feb. 14, 2011]

**216.405-2-71 Award fee reduction or denial for failure to comply with requirements relating to performance of private security functions.**

(a) In accordance with section 862 of the National Defense Authorization Act for Fiscal Year 2008, as amended, the contracting officer shall include in any award-fee plan a requirement to review contractor compliance with, or violation of, applicable requirements of the contract with regard to the performance of private security functions in an area of contingency operations, complex contingency operations, or other military operations or exercises that are designated by the combatant commander (see 225.370).

(b) In evaluating the contractor's performance under a contract that includes the clause at FAR 52.225-26, Contractors Performing Private Security Functions, the contracting officer shall consider reducing or denying award fees for a period if the contractor fails to comply with the requirements of the clause during such period. The contracting officer's evaluation also shall consider recovering all or part of award fees previously paid for such period.

[76 FR 52135, Aug. 19, 2011, as amended at 78 FR 73450, Dec. 6, 2013]

**216.405-270 Award fee reduction or denial for jeopardizing the health or safety of Government personnel.**

(a) *Definitions.*

*Covered incident* and *serious bodily injury*, as used in this section, are defined in the clause at 252.216-7004, Award Fee Reduction or Denial for Jeopardizing

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the Health or Safety of Government Personnel.

(b) The contracting officer shall include in the evaluation criteria of any award-fee plan, a review of contractor and subcontractor actions that jeopardized the health or safety of Government personnel, through gross negligence or reckless disregard for the safety of such personnel, as determined through—

(1) Conviction in a criminal proceeding, or finding of fault and liability in a civil or administrative proceeding (in accordance with section 823 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84)); or

(2) If a contractor or a subcontractor at any tier is not subject to the jurisdiction of the U.S. courts, a final determination of contractor or subcontractor fault resulting from a DoD investigation (in accordance with section 834 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111-383)).

(c) In evaluating the contractor's performance under a contract that includes the clause at 252.216-7004, Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel, the contracting officer shall consider reducing or denying award fees for a period if contractor or subcontractor actions cause serious bodily injury or death of civilian or military Government personnel during such period. The contracting officer's evaluation also shall consider recovering all or part of award fees previously paid for such period.

[75 FR 69361, Nov. 12, 2010]

## 216.406 Contract clauses.

(e)(1) Use the clause at 252.216-7004, Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel, in all solicitations and contracts containing award-fee provisions.

(2) Use the clause at 252.216-7005, Award Fee, in solicitations and contracts when an award-fee contract is contemplated.

[76 FR 8305, Feb. 14, 2011]

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### 216.470 Other applications of award fees.

See PGI 216.470 for guidance on other applications of award fees.

[71 FR 39008, July 11, 2006]

## Subpart 216.5—Indefinite-Delivery Contracts

### 216.501-2-70 General.

(a)(i) For items with a shelf-life of less than 6 months, consider the use of indefinite-delivery type contracts with orders to be placed either—

(A) Directly by the users; or

(B) By central purchasing offices with deliveries direct to users.

(ii) Whenever an indefinite-delivery contract is issued, the issuing office must furnish all ordering offices sufficient information for the ordering office to complete its contract reporting responsibilities under 204.670-2. This data must be furnished to the ordering activity in sufficient time for the activity to prepare its report for the action within 3 working days of the order.

(b) See 217.204(e)(i) for limitations on the period for task order or delivery order contracts awarded by DoD pursuant to 10 U.S.C. 2304a.

[56 FR 36340, July 31, 1991, as amended at 57 FR 42630, Sept. 15, 1992; 63 FR 11529, Mar. 9, 1998. Redesignated and amended at 78 FR 38235, June 26, 2013]

### 216.504 Indefinite-quantity contracts.

(c)(1)(ii)(D) *Limitation on single-award contracts.* (i) The authority to make the determination authorized in FAR 16.504(c)(1)(ii)(D)(1) shall not be delegated below the level of the senior procurement executive.

(ii) A copy of each determination made in accordance with FAR 16.504(c)(1)(ii)(D) shall be submitted to the Director, Defense Procurement and Acquisition Policy, ATTN: OUSD(AT&L)DPAP/CPIC, 3060 Defense Pentagon, Washington, DC 20301-3060.

[77 FR 23631, Apr. 20, 2012]

### 216.505 Ordering.

(1) Departments and agencies shall comply with the review, approval, and reporting requirements established in

accordance with Subpart 217.78 when placing orders under non-DoD contracts in amounts exceeding the simplified acquisition threshold.

(2) Orders placed under indefinite-delivery contracts may be issued on DD Form 1155, Order for Supplies or Services.

[63 FR 11529, Mar. 9, 1998, as amended at 70 FR 29642, May 24, 2005; 71 FR 14103, Mar. 21, 2006]

**216.505–70 Orders under multiple award contracts.**

If only one offer is received in response to an order exceeding the simplified acquisition threshold that is placed on a competitive basis, the contracting officer shall follow the procedures at 215.371.

[78 FR 38235, June 26, 2013]

**216.506 Solicitation provisions and contract clauses.**

(a) Insert the clause at 252.216–7006, Ordering, in lieu of the clause at FAR 52.216–18, Ordering, in solicitations and contracts when a definite-quantity contract, a requirements contract, or an indefinite-quantity contract is contemplated.

(d) Use the basic or the alternate of the clause at 252.216–7010, Requirements, in lieu of the clause at FAR 52.216–21, Requirements, in solicitations and contracts when a requirements contract for the preparation of personal property for shipment or storage, or for the performance of intra-city or intra-area movement, is contemplated.

(1) Use the basic clause if the acquisition does not involve a partial small business set-aside.

(2) Use the alternate I clause if the acquisition involves a partial small business set-aside.

(S-70) Use the provisions at 252.215–7007, Notice of Intent to Resolicit, and 252.215–7008, Only One Offer, as prescribed at 215.408(3) and (4), respectively.

[63 FR 11529, Mar. 9, 1998, as amended at 76 FR 25568, May 5, 2011; 77 FR 23631, Apr. 20, 2012; 77 FR 39139, June 29, 2012; 79 FR 22037, Apr. 21, 2014]

**Subpart 216.6—Time-And-Materials, Labor-Hour, and Letter Contracts**

**216.601 Time-and-materials contracts.**

(d) *Limitations.* (i) The determination and findings shall contain sufficient facts and rationale to justify that no other contract type is suitable. At a minimum, the determination and findings shall—

(A) Include a description of the market research conducted;

(B) Establish that it is not possible at the time of placing the contract or order to accurately estimate the extent or duration of the work or to anticipate costs with any reasonable degree of certainty;

(C) Establish that the requirement has been structured to minimize the use of time-and-materials requirements (e.g., limiting the value or length of the time-and-materials portion of the contract or order; establishing fixed prices for portions of the requirement); and

(D) Describe the actions planned to minimize the use of time-and-materials contracts on future acquisitions for the same requirements.

(ii) For indefinite-delivery contracts, the contracting officer shall—

(A) Structure contracts that authorize time-and-materials orders to also authorize orders on a cost-reimbursement, incentive, or fixed-price basis, to the maximum extent practicable; and

(B) Execute the determination and findings for—

(1) Each order placed on a time-and-materials basis if the indefinite-delivery contract also authorizes orders on a cost-reimbursement, incentive, or fixed-price basis; or

(2) The basic contract if the indefinite-delivery contract only authorizes time-and-materials orders. The determination and findings shall—

(i) Contain sufficient facts and rationale to justify why orders on a cost-reimbursement, incentive, and fixed-price basis are not practicable; and

(ii) Be approved one level above the contracting officer.

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(e) *Solicitation provisions.* Use the provision at FAR 52.216–29, Time-and-Materials/Labor-Hour Proposal Requirements—Non-Commercial Item Acquisition with Adequate Price Competition, with 252.216–7002, Alternate A, in solicitations contemplating the use of a time-and-materials or labor-hour contract type for non-commercial items if the price is expected to be based on adequate competition.

[71 FR 74471, Dec. 12, 2006, as amended at 73 FR 70912, Nov. 24, 2008]

### 216.603 Letter contracts.

#### 216.603–2 Application.

(c)(3) In accordance with 10 U.S.C. 2326, establish definitization schedules for letter contracts following the requirements at 217.7404–3(a) instead of the requirements at FAR 16.603–2(c)(3).

[75 FR 32642, June 8, 2010]

#### 216.603–3 Limitations.

See subpart 217.74 for additional limitations on the use of letter contracts.

#### 216.603–4 Contract clauses.

(b)(2) See 217.7405(a) for additional guidance regarding use of the clause at FAR 52.216–24, Limitation of Government Liability.

(3) Use the clause at 252.217–7027, Contract Definitization, in accordance with its prescription at 217.7406(b), instead of the clause at FAR 52.216–25, Contract Definitization.

[61 FR 7743, Feb. 29, 1996, as amended at 71 FR 58537, Oct. 4, 2006; 72 FR 69159, Dec. 7, 2007; 76 FR 76319, Dec. 7, 2011]

## Subpart 216.7—Agreements

### 216.703 Basic ordering agreements.

(c) *Limitations.* The period during which orders may be placed against a basic ordering agreement may not exceed 5 years.

(d) *Orders.* Follow the procedures at PGI 216.703(d) for issuing orders under basic ordering agreements.

[71 FR 39008, July 11, 2006]

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## PART 217—SPECIAL CONTRACTING METHODS

### Subpart 217.1—Multiyear Contracting

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### Subpart 217.72 [Reserved]